Supreme Court of the United States.

OCTOBER TERM, 1888.

—No. 132—

BULLITT COUNTY, - - - - - - - - Plaintiff in Error,

VERSUS

W. T. WASHER, et al., - - - - - Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR PLAINTIFFS IN ERROR, BY

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Brief for Plaintiff in Error.

In Error to the Circuit Court of the United States for the District of Kentucky.

STATEMENT OF THE CASE.

Pond Creek is in some part the dividing line between the Kentucky counties of Bullitt and Jefferson. The county court of the former county deemed it advisable that there should be constructed across that stream, at a point where it was the dividing line between the counties, a highway bridge for the convenience of the citizens of both counties. The statute laws of Kentucky concerning the county levy, binding the tax-payers, and building bridges, are as follows:

COUNTY LEVY (Section 1, article 3, chapter 27, General Statutes of Kentucky, title, County Levy):

"The county court, except for the county of Jefferson, unless composed of a majority of the justices of the peace of said county in commission, shall not have power to make appropriation of the county revenue or levy, or to make any charge thereon greater than fifty dollars for any one object."

JURISDICTION OF COUNTY COURT (Section 1, article 16, chapter 28, General Statutes of Kentucky):

"County courts have jurisdiction to lay and superintend the collection of the county levy, erect and keep in repair necessary

public buildings, bridges, and other structures, and superintend the same; regulate and control the fiscal affairs and property of the county; make provision for the maintenance of the poor and provide for good condition of the highways in the county; and to execute all of its orders consistent with law and within its jurisdiction." (Page 305.)

COUNTY COURT—HOW COMPOSED (Section 1, article 17, chapter 28, General Statutes of Kentucky):

"The county judge in each county shall hold the county court on the days prescribed by law, but at the Court of Claims the justices of the peace shall be associated with him and constitute the court, a majority of whom shall constitute a quorum for the transaction of business, which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county." * * * *

Section 5, same article:

"The county court is a court of record." (Page 307.)

Section 9, same article:

"The records of the county court show by whom the court is holden. When the justices of the peace compose a part of the court the records must state the names of those who take their seats, and when a member leaves the bench his absence must be noted."

ROADS AND PASSWAYS (UNDER WHICH IS INCLUDED BRIDGES) (Section 36, article 1, chapter 94):

"When the county court of any county shall deem it advisable to erect a bridge or causeway over any place between that and an adjoining county, the court shall appoint a commissioner and notify the court of the adjoining county thereof, and request the latter to appoint a like commissioner, and it shall be the duty of the court so requested to appoint such commissioner. The persons so appointed shall meet at the place so proposed for erecting the bridge or causeway and agree on a plan for the same, and contract for the erection thereof; and each of said county courts shall levy the costs of such work on its county in proportion to the number of tithables in each county."

Following this statutory provision the County Court of Bullitt County, composed in the first instance of the county judge alone, appointed James W. Ridgway a commissioner for the purpose of

conferring with a like commissioner to be appointed by the county of Jefferson.

The two commissioners, for some reasons immaterial to this record, failed to agree, and thereafter Ridgway, pretending to act as the commissioner of Bullitt County, made a contract with W. T. Washer, the defendant in error, to construct the proposed bridge. The contract was in form *inter partes*—between the county of Bullitt by Ridgway, commissioner on the one part, and W. T. Washer on the other. The county of Jefferson was in nowise a party or privy to it. The contract stipulated that Washer should construct the bridge at a stated point, according to certain plans and specifications, and that he should receive therefor a specified compensation for the various items of work to be performed, to be paid by Bullitt County. The contract thus formerly drawn between the county of Bullitt, by commissioner, on the one part, and Washer on the other, in terms contracting the whole liability for the costs of the bridge on the county of Bullitt, concluded with this stipulation:

"It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantee the payment of the whole work to the second party."

After this writing was made, as above stated, Washer prepared to build the bridge, and placed at the point of its location a quantity of material for its construction, and actually performed some work of construction. Before the bridge was completed, however, a notice signed by the county judge and county attorney of Bullitt County was served on Washer, directing him to quit work on the bridge, and stating that Bullitt County would not be responsible for any work done after the service of the notice. The notice stated that this step was taken for the purpose of compelling Jefferson County to bear its proportion of the cost of the bridge. After receiving this notice Washer abandoned the work, and this action was brought in the Circuit Court of the United States for the District of Kentucky, by Washer and his

assignees, Danenhauer and Baecker, against Bullitt County. The petition and amended petition set out the alleged contract of Bullitt County made by its commissioner, and the orders of the county court, by which they allege the commissioner was authorized to act. The notice given to quit work is stated as a breach of the contract, and damages are claimed to the amount of work and labor done and materials furnished.

A demurrer was sustained by the circuit court to the petition and amended petition on the ground that it is beyond the power of one county to contract for building a bridge over the dividing line between it and an adjoining county. From that judgment the plaintiffs prosecuted a writ of error, and the judgment of the circuit court was reversed, and the case remanded with directions to overrule the demurrer. (Washer, *et al.* v. Bullitt County, 110 U. S. 558.)

Upon the return of the case to the circuit court Bullitt County answered. The issues presented by the answers, so far as they need be here recited, are these: (*a*) The contract sued on was not the contract of Bullitt County. (*b*) The commissioner who made the contract had no authority to act for or bind the county in that behalf. (*c*) The commissioner was not appointed for the purpose of making a contract to build the bridge, but for the purpose of "viewing routes across Pond Creek, and a site for a bridge to be erected between Bullitt and Jefferson counties, and to confer with a commissioner to be appointed from Jefferson County . . . and to report to court." (*d*) That all the orders of the Bullitt County Court contemplated joint action on the part of Bullitt and Jefferson counties, and that, upon the representation of plaintiffs that they had performed work on and furnished materials for the bridge of greater value than $3,000, the county, at their instance, paid them $1,800, which was accepted in full of the share of Bullitt County in the entire cost of the construction of the bridge, and upon the agreement that the plaintiffs would look to Jefferson County for the remainder of the cost. (*e*) A denial that Bullitt County had prevented the completion of the work, or notified the plaintiffs to cease work

on the bridge. (*f*) A counter-claim seeking judgment over against the plaintiffs for the amount paid them by the county, upon the allegations that the work done was unskillfully done, and that the work was not completed, but the work abandoned by the plaintiffs.

After the filing of this answer, which exhibited a complete copy of the record of the county court concerning the Pond Creek bridge matter, the defendant in error offered a second amended petition (page 85, Record), showing that the alleged contract relied upon was still in the hands of the alleged commissioner, Ridgway.

The county objected to the filing of the second amended petition upon the ground that it changed the cause of action from an alleged contract authorized by the record of the county court to one not so authorized, that it was made by persons who were by the record shown to be *functi officio*, and that the attempt to charge the county with this debt was to be made out of circumstances and matters entirely dehors the records of the county court. The court allowed this to be filed over the county's objection. A trial of the issues found by the pleadings resulted, under the rulings of the circuit court, in a verdict for the plaintiffs for the full amount claimed, and judgment rendered accordingly.

A motion for a new trial was made by the defendant and overruled by the court.

Upon the trial the plaintiff offered in evidence the contract made by Ridgway as commissioner, and also all the orders of the Bullitt County Court with reference to the bridge and its construction. The county objected to the introduction of the contract in evidence, and thus arose the question whether the commissioner was, by the orders of the county court, authorized to make the contract. The court permitted the contract to be read and the county excepted.

The plaintiffs offered in evidence a notice signed by the county judge and attorney directing Washer to quit work, and also a letter written by the county judge to the commissioner, Ridgway, in respect of the notice to quit work which was exhibited

by Ridgway to Washer, and to the introduction of these papers the county objected because they were incompetent for any purpose, and because there was nothing showing that they were authorized by the county court of Bullitt county. Against the objection of the county, the court permitted them to be given to the jury. In this wise arose the questions, (1) Whether the papers offered in evidence amounted to a renunciation of the contract on the part of the county, and (2) whether they were authorized by the county court and binding on the county.

The court permitted the plaintiff to introduce, against the the objection of the county, certain parole evidence tending to show that W. Carpenter, county judge, accepted the bid of Washer, and directed Ridgway as commissioner to execute a contract with Washer on behalf of the county, binding the county to pay the entire cost of the bridge, and thus was presented the questions, (1) Whether any evidence was competent to show a contract by the county, beyond the orders of the county court entered of record. (2) Whether W. Carpenter, county judge, was authorized to contract on behalf of the county, and, if so, whether he had the power to delegate the authority to Ridgway. (3) Whether W. Carpenter, county judge, by his acts in that behalf made an oral contract on the part of the county, and, if so, whether such oral contract was admissible in evidence.

At the conclusion of the evidence the county asked the court to instruct the jury that the plaintiffs could only recover Bullitt County's share of the cost of building the bridge, reckoned in proportion of its tithables to the sum of the tithables of both Jefferson and Bullitt counties. The court refused to give this instruction, and in this wise was presented the question of the construction of the contract. The county contending that if the contract was the contract of the county, it bound the county by its terms only to the payment of its lawful proportion of the cost of the bridge, and that so much of the contract as was a guarantee of the liability of Jefferson County was not authorized to be made by the commissioner, or, if authorized, it was a con-

tract beyond the power of Bullitt County to make, and so was void.

Specification of Errors.

An assignment of errors was filed, which appears at the end of the printed record, and the errors relied on in this argument are therein sufficiently stated.

Points and Authorities.

1. The jurisdiction of county courts in Kentucky. (Section 1, article 3, chapter 27, General Statutes of Kentucky, title, County Levy; Section 1, article 16, chapter 28, General Statutes.)

2. County court, how composed. (Section 1, article 17, chapter 28, General Statutes of Kentucky.) County court a court of record. (Section 9, same article.)

3. Roads and pass-ways, which includes bridges. (Section 36, article 1, chapter 94, General Statutes of Kentucky.)

4. The jurisdiction of a county court of a Kentucky county as to building a bridge over a stream between two counties is so exactly defined, and the mode and manner of its exercise so precisely regulated by the Kentucky Statutes that they form a complete law upon the subject, and repeal all common-law rules or construction upon that subject. (Broaddus v. Broaddus, 10 Bush, 299, section 1, act of the General Assembly of the Commonwealth of Kentucky, entitled an Act to adopt the General Statutes.) Approved April 22, 1873.

5. A statutory provision must be strictly construed. (Vertrees v. Smith, 10 Peters, 161; Williams v. Peyton's executors, 4 Wheaton, 77; Sead's executors v. Course, 4 Cranch, 403.)

6. A county court in Kentucky can only speak by its record. (Section 5, article 17, chapter 28, General Statutes. Fletcher v. Leight, 4 Bush, 306.)

7. When defendant in error filed the second amended petition it appeared that the alleged contract was then in *pais* in the hands of a defunct commissioner, and ratification of record should have been alleged.

8. No written or record authoritee to guarantee Jefferson County's part being alleged to have been given the alleged Bullitt County commissioner, the authority must be presumed to have been verbal only. (Bradley v. Lamb, Hardin's Rep. 527; Smith v. Fox, 15 Ben Mon. 443; Hocker v. Gentry, 3 Met. 474; Byasse v. Reese, 4 Met. 373.)

9. These Kentucky statutes concerning bridges have been construed by the Kentucky Court of Last Resort to mean that where joint action was contemplated by the record, neither county could be bound unless both were. (Nelson County v. Washington County, 14 Ben Monroe, 92; Garrard County Court v. Boyle County Court, 10 Bush, 208.)

10. And that express statutory authority is required to authorize a county court to bind the tax-payers. (Bowling Green, etc., Railroad Company v. Warren County, 10 Bush, 718; Campbell County Court v. Taylor, 8 Bush, 206; Dillon on Municipal Corporations, section 104; Pennsylvania R. R. Company v. St. L. etc. R. R. Co., 118 U. S. 290; Wells v. Supervisors, 102 U. S. 625; Marsh v. Fulton Co., 10 Wallace, 676; Mayor v. Ray, 19 Wall. 475.)

11. When a mode of making a contract has been pointed out by the legislature, that mode is restrictive. (McCracken v. San Francisco, 16 Cal. 591; cited with approval in Marsh v. Fulton Co., *supra.*)

12. The county court having directed joint action and a report from its commissioner, no other mode could be followed. (McCracken v. San Francisco, *ibid.*)

13. When the adoption of any particular form or mode is necessary in the first instance to confer authority, there can be no valid ratification except in the same manner. (McCracken v. San Francisco, 16 Cal. 642; Pratt v. Town of Scranton, 15 Vt. 147; Chamberlain v. Inhabitants of Dover, 13 Maine, 466.)

14. Defendant in error can not claim to be innocent in the matter. He was not bound to contract in such a manner. (Marsh v. Fulton Co., 10 Wall. 682.)

15. The authority of the county court and its records were

open to Washer's examination, and he must have judged for himself as to the power of the corporation to be bound by a contract. (Salt Lake City v. Hollister, 118 U. S. 263.)

16. There is a broad distinction between *quasi* corporations of a municipal character and those for profit. In the former, those contracting with them must judge for themselves as to their power to enter into a proposed contract. (Salt Lake City v. Hollister, 118 U. S. 263; Hitchcock v. Galveston, 96 U. S. 341; Police Jury v. Britton, 15 Wall. 571.)

17. Authority to a county judge by name to accept a bid will not authorize him to authorize a defunct commissioner to make a contract never authorized by the county court. Delegated authority can not be delegated. (Dillon on Municipal Corp., sections 60, 567, 618, 649, and notes.)

18. Even though Ridgway, by Carpenter's direction, could have bound Bullitt County for its own part, it does not follow that he could do so for Jefferson County's part. (The Floyd Acceptances, 7 Wall. 666.)

19. This whole trouble arose from the irregular and unauthorized manner in which Washer, the alleged contractor, proceeded; and for it the county is in nowise responsible, either legally or morally. There never was any joint contract, and when the county judge found the defunct commissioner and the contractor proceeding, his notice to stop was no ratification or recognition of a contract containing the extraordinary guarantee. The county judge could not have ratified this except by express record authority from the county court. (Marsh v. Fulton County, 10 Wall. 676; McCracken v. San Francisco, 16 Cal. 591.)

20. There could be no ratification except by record, and, with full knowledge that Ridgway had, by verbal direction from Carpenter, assumed to contract for both counties. (Owings v. Hall, 9 Peters, 629; Fletcher v. Dyrast, 9 B. Mon. 415; Dunlap's Paley's Agency, 171, note q.)

21. The levy orders of July 16, 1877, and November 18, 1878, by the county court were not a ratification of this guaran-

tee clause. One was made nearly a year before the date of the contract, and every thing in the record must be presumed to refer to the action, and the only one which Ridgway and Horine were authorized to take by the order of February 18, 1878 (Record page 65), which was to meet and confer.

22. It is conclusive that every thing in the record must refer to contemplated joint action by the counties by Ridgway and Horine under the appointment of February 18, 1878, and that all parties understood this, otherwise Washer would have taken his contract with Carpenter instead of Ridgway and Horine.

23. The orders of court paying the contractors money must be presumed to refer to the contract by the counties jointly authorized by the record to be made, and not to the unauthorized clause to guarantee Jefferson County's part, and unless the county court knew of that extraordinary document in Ridgway's hands and fully understood it there was no ratification. (Owings v. Hall, 9 Peters, 629; Fletcher v. Dyrast, 9 B. Monroe, 415; Dunlap's Paley's Agency, 171, note q.)

24. The parol evidence as to the production of "W. Carpenter's" letter being read by Ridgway to Washer, and Ridgway's order to Washer to stop was error, in any event, for three reasons: (1) Carpenter not only had no authority to ratify this unauthorized guarantee (section 1, article 3, chapter 27, General Statutes, Ky.), (2) but his language in his letter shows he did not know of it, but that he was expressly disavowing any such idea. He says "Bullitt County will not pay Jefferson's part." (3) If there had been a valid contract made, no notice from Carpenter, Ridgway, or any one but the county court, could have given Washer an excuse to abandon his work.

25. There is no hardship here unless it be upon Bullitt County, which has lost its money and received nothing in return. The sum of $1,800 which Washer received was far more than her share if the lawful procedure had been followed. Bullitt County is small in territory and sparse in population as compared to Jefferson, the difference being five to one, and it is preposterous and unjust to make her pay $4,372.13 in addition to the $1,800 already paid.

26. By the irregular and unauthorized proceeding of Washer, Ridgway, and Horine the tax-payers of Bullitt County lost $1,800 in money and got no bridge. No fault can be imputed to them or their authorized representatives. If Washer had gone on and completed the work he might have in equity held Bullitt County for her share, but without authority or good cause he abandoned the work and the tax-payers get nothing, and they should have their money returned.

ARGUMENT.

It may, at the outset, be suggested that the opinion of this court on the former writ of error decided only the single point, that it was not *ultra vires* of Bullitt County to oblige itself to pay the entire cost of building a bridge across the dividing line between it and Jefferson County. The question arose upon a demurrer to the petition, and, as stated by the court in the opinion:

"The only controversy between the parties is whether Bullitt County had authority to make the contract sued on, by which it undertook, at its own cost, to build across a boundary stream a bridge, one end of which was within the territory of another county." (Washer v. Bullitt County, 110 U. S. 562.)

No other meritorious question was presented or decided, and it will, therefore, be regarded that no other question is concluded by the opinion of this court on the former writ of error.

It must now be conceded, for the purposes of this case, that Bullitt County had the *power*, as a municipal corporation, to build the bridge in question, and to tax its citizens for the payment of the costs of building it. The county, therefore, had the power to contract for building the bridge.

Primarily, the question comes, whether the contract on which the plaintiffs' case is based was the contract of the county? This question involves two further questions: (1) How, as matter of law, may a county contract? (2) Whether, as a matter of

fact, the contract under consideration was made by the county in the mode provided by law?

It is the settled law of Kentucky that a county can contract only through and by the county court, composed of the county judge and a majority of the justices of the peace of the county. The county judge alone has no power to contract on behalf of the county, nor has he in conjunction with any number of justices of the peace of the county less than a majority of them any such power. (Harrison County Court v. Smith, 15 B. Mon. 166; B. G. & M. R. R. Co. v. Warren County Court, 10 Bush, 717.)

It is also the well-settled law of Kentucky that the county court, being a court of record, can act only by its record, and a contractual liability can not be fixed against a county except as it is shown to exist from the records of the properly constituted county court.

The General Statutes, chapter 28, article 17, section 5, provides: "The county court is a court of record." (Mercer and Garrard Counties v. Navigation Co., 8 Bush, 300; Fletcher v. Leight, 4 Bush, 307.)

It is contended on the part of the county that the contract for building the bridge was not, as matter of fact, made or authorized by the county court composed of the county judge and a majority of the justices of the peace of the county, and that there is no record of the county court, so constituted, showing that the contract was made or authorized to be made.

Unless the plaintiffs in their petition and amended petition specifically stated orders of record made by the properly constituted county court making the contract sued on, or authorizing it to be made, they exhibited no cause of action against the county.

But inasmuch as all the orders of the county court with reference to the matter were offered in evidence, the question whether they were properly pleaded may be waived in order at once to reach the real question, whether the contract was made or authorized to be made on behalf of the county.

The first order of the county court with reference to the bridge in question was entered at the May term, 1877, and is as follows:

"Present: Honorable W. Carpenter, Judge.

"It is ordered that James W. Ridgway be and he is hereby appointed a commissioner for the purpose of viewing Pond Creek and selecting a site for the erection of a bridge across said creek, and he is directed to meet and confer with the commissioner appointed by the Jefferson County Court for the same purpose, and they will view the site proposed at Steele's Ford, and may view other sites, and report in favor of that which will be the least expensive, having due regard to the convenience of the traveling public, and they will make report to court." (Printed Record, page 20.)

This order gave the commissioner no power to contract for building the bridge, and, moreover, it was made by the county judge alone, and therefore could not confer upon him the authority to contract on behalf of the county.

Under this order the commissioner reported to court on the 18th of June, 1887.

The report stated that he had "met and conferred with the commissioners of Jefferson County, who have declined to take any action until the action in said matter by the Bullitt Levy Court."

The commissioners further reported in favor of "the Brawner site," and stated that the bridge could be built at that point at a cost of $2,500. (Printed Record, pp. 21, 22.)

This report of the commissioner was made to a county court composed of the county judge and a majority of the justices, and the order entered upon filing the report was as follows:

"This day came J. W. Ridgway, commissioner herein, and filed his report, which is confirmed as to the necessity of erecting the bridge; and the Brawner foundation site, where the abutments are now situated, is adopted as the cheapest and most available site for erecting said bridge. It is further ordered that James W. Ridgway be and he is hereby appointed a commissioner to confer with a like commissioner, to be appointed by the Jefferson County Court, upon plans and specifications for said bridge, and the probable cost of same. They are authorized to ascertain by any means they may see proper the least amount that will erect said bridge, and make report to this court at the next term thereof." (Printed Record, p. 21.)

While it is true that this order was entered by the county court composed of the county judge and a majority of the justices, it is evident that it gave the commissioner no authority to contract.

The next order entered in the proceeding was on the 16th of July, 1877, and was made by a court composed of the county judge and a majority of the justices. It is as follows:

"It is ordered that six hundred dollars be appropriated, to be paid out of the county levy of Bullitt County, for the purpose of erecting a bridge across Pond Creek at the Brawner foundation site, to be levied at the November court of claims, 1877; and J. W. Ridgway, the commissioner herein, is directed to report plans and specifications for erecting said bridge, and also to report any bids that may be offered, and the amount of each bid, if any are made. W. Carpenter, county judge, is authorized to receive bids, and accept or reject the same as he may think proper, looking to the interest of Bullitt and Jefferson counties in the matter." (Printed Record, pp. 22, 23.)

This order conferred no power upon Ridgway to contract. It authorized him only to *report* bids. The authority given to W. Carpenter, county judge, to receive bids, and to accept or reject them as he might think proper, was tantamount, as may be conceded, to an authority *to him* to contract. It is to be recollected that the contract was not made by Carpenter, county judge, but by Ridgway, commissioner. After the order of July 16th there was no order entered in the proceeding until November 19, 1877. The order of the latter date was entered by a court composed of the county judge alone. It is as follows:

"It is ordered that James W. Ridgway be appointed commissioner on behalf of Bullitt County to contract for the building of a bridge across said creek at the place heretofore selected as a site, and he will report to court on the matter." (Printed Record, p. 23.)

This order, in terms, conferred upon the commissioner, Ridgway, the power to contract for building the bridge on behalf of the county, but it could not be available for that purpose, because it was made by the county judge alone, and he had no power to bind the county in that respect.

The orders above recited are all the orders entered in any way connected with the power of the commissioner, Ridgway, to make the contract filed with the petition. It is evident, therefore, that the commissioner in the first instance had no power to execute the contract on behalf of the county, and that the contract was void unless it was afterward ratified by the county.

The county having the power to contract only by an order of the county court, composed of the county judge and a majority of the justices of the peace of the county, it must be conceded that it could ratify a contract in no other way than by an order of record made by such a court. On the 18th of November, 1878, the following order was entered by the county court, composed of the county judge and a majority of the justices:

"It is ordered that a tax of five per cent upon each one hundred dollars' worth of taxable property of Bullitt County be levied for the purpose of paying for the erection of a bridge across Pond Creek, to be collected by the sheriff of Bullitt County as other revenue tax is collected, the amount of property to be ascertained from the assessors book to be returned for the year 1879, and said tax to be collected for said year.

"It is ordered that Jacob Danenhauer and Peter Baecker, assignees of W. T. Washer, contractor to build a bridge across Pond Creek, be allowed the sum of twelve hundred dollars ($1,200), to be paid out of the five per cent levy this day made." (Printed Record, pp. 25, 26.)

This is the first and only order in which the name of Washer or of Danenhauer and Baecker appear, and the first and only one in which an intimation is contained that a contract to build the bridge had been made. It is to be observed that the alleged contract had not at that time, or at any time for the matter of that, been reported to court. There is no note of record anywhere at any time of the fact that the contract had been made by Ridgway, commissioner. The contract was never filed in the county court, but the fact presses itself that the order of court imports upon its face some knowledge of an existing contract. That is true, and, so far as it is true, we are unable to contend that it did not amount to a ratification to the extent of such

knowledge. Taking all of the orders of court together, from the very first to the very last, the continuous and uninterrupted purpose appears that Bullitt County should act only in conjunction with Jefferson County, and that each county should be responsible for the cost of the bridge in the proportion and to the extent fixed by law. The proceeding to build the bridge began under the provisions of the statute law in respect of the liability of the two counties. That any contract was made binding Bullitt County for the whole cost of the bridge, or that the court had knowledge of any such contract, is entirely inconsistent with the record. The records of the county court everywhere show that the liability of Bullitt County for its proportionate part of the cost was recognized and contemplated. That Bullitt County was to be responsible for the proportionate part of Jefferson County is nowhere suggested. In the face of all this the naked appropriation of a sum of money to a person styled *contractor* certainly can not be distorted into a ratification of a contract whereby Bullitt County is not only bound for its proportionate part of the cost, but also the proportionate part of Jefferson County. Until this order of appropriation was made, Bullitt County was absolutely not bound upon the contract at all. The contract was, as to the county, simply void. It was, in effect, a contract to pay the proportionate part of Bullitt County in the cost of the bridge and to guarantee Jefferson County's part. Certainly the payment was made only upon the direct liability of Bullitt County for its proportionate part, and could only operate to ratify the contract to the extent that it bound Bullitt County to pay its proportionate part.

In this view of the case the county asked the court below to instruct the jury:

"That plaintiffs could only recover of defendant for building said bridge Bullitt County's share, calculated in proportion of her tithables to the sum of the tithables of Jefferson and Bullitt counties." (Printed Record, p. 44.)

This instruction the court refused to give.

If the contract, in its entirety, can be held to have been ratified by the order of the county court appropriating a sum of money to a person designated as *contractor*, then so much of the contract as guaranteed the payment by Jefferson County of its proportionate part of the cost of the bridge was *ultra vires* and void.

It must be clear that the contract taken as a whole is properly construed as a contract on the part of Bullitt County to pay its proportionate part of the cost of the bridge, and a guarantee that Jefferson County should pay its proportionate part.

The contract, excluding the last clause, is in terms an agreement upon the part of Bullitt County to pay the whole cost, but the last clause of the contract expressly provides that Jefferson County shall pay its proportionate part, in these terms:

"It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantees the payment of the whole work to the second party." (Printed Record, p. 5.)

The effect of the contract, then, is that Bullitt County undertook directly to pay its part of the cost only, and to guarantee that Jefferson County should pay its part. This contract of guaranty was *ultra vires* of the county and void, for while the county, as held by this court on the former writ of error, had the power to contract for building the bridge entirely, it certainly did not have the power to guarantee that another county would do any thing in respect of it.

It is a general rule that private corporations, without express statutory authority, can not enter into contracts as guarantors or sureties for the debt, default, or miscarriage of another. (Pennsylvania R. R. Co. v. St. L., etc. R. R. Co., 118 U. S. 290, and authorities there cited.)

This rule being true as to mere private corporations, for much stronger reasons is it also true of municipal corporations.

The order of the properly constituted court of July 16, 1877, above recited, contained the following authorization:

"W. Carpenter, county judge, is authorized to receive bids, and accept or reject same as he may think proper, looking to the interest of Jefferson and Bullitt counties in the matter." (Printed Record, p. 23.)

The court below held that W. Carpenter, county judge, under this order had the power to contract for the county, *and that he could delegate that power to another; or else that it was competent in support of the plaintiff's alleged cause of action to show that W. Carpenter, county judge, made an oral contract with Washer to build the bridge.*

In order to show that Ridgway, commissioner, made the contract by virtue of authority delegated to him by W. Carpenter, county judge,

"The plaintiff offered parole evidence tending to show that, in pursuance of said orders of July 16, 1877, and November 19, 1877, J. W. Ridgway, the commissioner named in those orders, reported to W. Carpenter, county judge, named in said orders, plans, specifications, and bids for constructing the bridge named in said orders, and the amount of each of the bids, and among others the bid of the plaintiff, Washer, and that said W. Carpenter, county judge, received said plans, specifications, and bids, and accepted said bid of plaintiff, Washer; that said Ridgway, commissioner, by direction of said Carpenter, county judge, then executed and delivered to plaintiff, Washer, the contract sued on, conforming to said bid, and plaintiff signed and delivered to said Ridgway, commissioner, a copy thereof, which said Ridgway kept in his possession." (Bill of exceptions, printed Record, p. 39.)

It is at once clear, upon mere suggestion, that whatever power was given to W. Carpenter, county judge, in the order of July 17, 1877, must be exercised by him alone, and that it could not be delegated to another person. Besides the notion of the power of delegation, the only other idea upon which this parole evidence was competent is that it was permissible to the plaintiffs in support of their cause of action to show that W. Carpenter,

county judge, made the contract orally with Washer. It is to be recollected that the action was upon a contract in writing executed by Ridgway, commissioner. It certainly would be a fatal variance to show in evidence a contract not in writing, but in parole, and not made by Ridgway, commissioner, but by W. Carpenter, county judge. But beyond all this, if it were competent to prove an oral agreement, then so much of the oral agreement as bound Bullitt County for the debt, default, or miscarriage of Jefferson County was within the statute of frauds, and so unenforcible. From this point of view the court should have given the instruction asked by the county to the effect that it was only responsible for its proportionate share of the costs of the bridge.

If it can be determined that the contract was the contract of the county, made entirely within its lawful powers and by the lawfully constituted authority, and so binding upon the county, yet the plaintiffs in this action neither in their pleadings nor in their evidence exhibited a cause of action against the county.

The possible causes of action to the plaintiffs were two:

1. An action upon the contract for the amount agreed to be paid, and the condition precedent to this action was the completion of the work in accordance to the contract.

2. An action for damages caused by the renunciation of the contract by the county.

There can be but two rational constructions of the contract as to when the cost of building was to be paid by the county: one, that the whole cost of the bridge was to be paid on its completion, the other that each item of work was to be paid for respectively as each was completed, that is, the masonry was to be paid for when completed, and so as to the excavation, fills, etc.

So much of the contract as is material to its proper construction is as follows:

"That the first party has this day contracted with the second party to erect an arched stone bridge across Pond Creek at the

Brawner foundation site, which said creek is the dividing line between the counties of Bullitt and Jefferson: said bridge to be built according to the following specifications: . . . . . The bridge to be good and substantial, and the work done in a workmanlike manner, to be accepted by the party of the first part by her commissioners aforesaid; and the second party agrees to build said bridge according to the foregoing specifications, at the following rates, which the first party agrees to give when said work is completed and accepted, viz:

"For masonry, five dollars and thirty cents per cubic yard, including cleaning off the ground etc.; for fill in the embankment, seventeen and three fourths cents per cubic yard."

The contract was changed by writing indorsed on it as follows:

"All reference in above specifications to stone work shall read stone abutments on the same foundation, and the same kind and character of masonry; the abutments shall be twenty-six feet high, and a wrought-iron truss bridge on said abutments according to specifications," etc. (Printed Record, pp. 5, 6.)

It would seem to be clear that the agreement to pay "*when said work is completed and accepted*" was an agreement to pay when the *bridge* was completed and accepted, because the building of the bridge was the work contracted for, and the statement of the particular items of work necessary in its construction was made solely for the purpose of fixing a basis for the determination of the ultimate costs of the bridge upon its completion, and the amount then to be paid. The cost of the bridge in the outset could not be determined, except as it was determined how much of each kind of work would be required to complete it, and, unless these facts were conveniently determinable in advance, it was expedient to fix a basis by stipulating that a certain rate should be paid for each kind of work. Such evidently was the purpose of the contract.

But at all events the most that can be contended for on the part of the plaintiffs below is, that the contract was to pay for each item of work *at the time each item was completed.*

The petition neither alleges that the bridge itself was completed, nor that any item of work was completed, so that there was no cause of action stated upon the contract.

It remains then to be determined whether there was pleaded and proved a renunciation of the contract by the county, so that the contractor had a cause of action by reason thereof for damages. It is evident from the pleadings that the plaintiffs below put their case upon this ground. No question as to the *quantum* of damages seems to have been raised in the record by the county. The question is simply, was there a renunciation of the contract by the county at all?

The plaintiffs below alleged and proved that they abandoned the work because the following notice was served on the contractor:

"Mr. W. T. Washer: You are hereby notified that Bullitt County will not be responsible or pay for any work that you may do on the Pond Creek bridge after the service of this notice. You are therefore notified to stop all work on said bridge immediately. This step is taken advisedly with a view of compelling Jefferson County to do her part in building said bridge. All work must be immediately stopped, or proper proceedings will be instituted to stop same.

"December 10, 1878. W. CARPENTER, *P. J. B. C. C.*
F. P. STRAUS, *County Attorney.*"

It is not alleged or pretended that this notice was authorized to be given by any order of the county court. It is not alleged or pretended that there was any order of the county court renouncing the contract, or directing the contractor to stop the work. What was done, was done only by W. Carpenter, county judge, and F. P. Straus, county attorney. They had no more power or authority in the premises than any other citizen of the county.

It is beyond dispute that no power other than that which could make the contract in the first instance could renounce it. Therefore the power to renounce the contract resided only in the county court, composed of the county judge and a majority of the justices of the peace of the county, and that court so composed could renounce it only by an order of court to that effect entered of record. It is not alleged or proved that there was any record of the county court even remotely connected with the alleged renunciation of the contract.

The fifth ground of the county's motion for a new trial, which is as follows, was certainly well taken:

"*Fifth.* The court erred in the following part of the charge and instructions to the jury, to wit: That order to quit justified Washer in quiting temporarily. Originally he was bound to go on and complete the job, and nobody could stop him but the person representing the county, but the county did stop him, and he had the right to stop temporarily, and if he did not choose to go on again his right of action accrued when he stopped, if right of action he had." (Printed Record, p. 37.)

We respectfully submit that the judgment of the circuit court should be reversed.

D. M. RODMAN,
FRANK P. STRAUS,
Of Counsel for Plaintiff in Error.

D. M. RODMAN,
FAIRLEIGH & STRAUS, *Counsel.*

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

No. 132.

BULLITT COUNTY, PLAINTIFF IN ERROR,

vs.

W. T. WASHER, JACOB DAUENHAUER, AND PETER BAECKER, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR BY AUGUSTUS E. WILLSON.

AUGUSTUS E. WILLSON,
Of Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR BY AUGUSTUS E. WILLSON.

This is a writ in error to the circuit court of the United States for the district of Kentucky by Bullitt County of Kentucky, plaintiff in error, to reverse the judgment for $4,372.13, recovered in the court below, in favor of W. T. Washer and his assignees, Jacob Dauenhauer and Peter Baecker, March 19, 1885 (Pr. Rec., 35), reduced by order of court March 24th, 1885 (Pr. Rec., 38), to $4,180.07 upon a verdict in an action on a contract for building a bridge across Pond creek between Bullitt county and the adjoining county of Jefferson.

The court below sustained a demurrer to the petition and

dismissed this action, but on the writ of error that judgment was reversed. (Washer *vs.* Bullitt Co., 110 U. S., 558.)

The demurrer contained a counter-claim against Washer for $600, paid him under the contract, and against Dauenhauer and Baecker for $1,200, paid them on the contract after Washer assigned it to them. The judgment rendered, added to the counter-claim against Washer, $600, makes less than $5,000; but the $1,200 counter-claim of Dauenhauer and Baecker, added to the judgment, makes over $5,000 as to Dauenhauer and Baecker.

The petition (Pr. Rec., 1–4) alleged that Bullitt county made the contract to build the bridge across Pond creek between Bullitt and Jefferson counties, in Kentucky, and that the copy of the contract filed with petition was the one given by the county, through its commissioner, to Washer, and that under the contract Washer began to build the bridge and incurred a great expense; that subsequently he assigned the contract to Dauenhauer and Baecker, and the transfer was approved by the county; that $5,325.14 worth of work was done and was accepted and received by Ridgway, as commissioner of the county, as shown by his certificate filed with petition; that while proceeding to finish the bridge the county, through the presiding judge of the county court, notified the contractor to stop work immediately by a writing filed with petition, and that the contractor was compelled, without fault on his part, to suspend and did suspend the work.

The amended petition (Pr. Rec., 9–12) alleged that the county court, composed of a majority of the magistrates, deemed it necessary to erect a bridge at this place across Pond creek, and appointed a commissioner and notified the Jefferson county court and requested it to appoint a like commissioner, which it did, and that the commissioners met at the place proposed for erecting the bridge, agreed on a plan for it, and contracted for the erection thereof, which was begun, and the Brauner foundations mentioned

in the petition and contract were built; but there the work stopped; that before the work began under the contract in this case the owners of the lands, approaches to the bridge, relinquished the right of way to and across the bridge, which was held by Bullitt county when this contract was made, and thereafter and before this contract was made the county court of Bullitt county, composed of the presiding judge and a majority of the justices, appointed commissioners, notified the Jefferson county court and requested it to appoint like commissioners to contract for the bridge, which it did; and the commissioners met at the place proposed and mentioned in said contract, but could not and did not agree upon a plan for erecting the bridge nor contract for it; that the Jefferson county court did not refuse to appoint commissioners, and thereupon the county court of Bullitt county, composed of a majority of the justices and the county judge, decided that it was necessary to erect the bridge, and, having exhausted all the means provided by the statutes for securing the aid of Jefferson county in building said bridge, decided to erect said bridge.

And thereafter, on July 16th, 1877, the Bullitt county court, composed of said judge and majority of the justices, entered an order appropriating $600 for the purpose of erecting a bridge across Pond creek at the Brauner foundation site, and "J. W. Ridgway, the commissioner herein, is directed to report any bids that may be offered, and the amount of such bids, if any are made. W. Carpenter, county judge, is authorized to receive bids and accept or reject the same, as he may think proper, looking to the interest of Bullitt county and Jefferson county in the matter," and that the commissioner, Ridgway, reported plans and specifications for erecting the bridge, and the bids and the amount of said bids, including the bid of Washer, and the county judge, Carpenter, received and accepted Washer's bid, and entered an order appointing Ridgway a commissioner to contract for building the bridge, and that Ridgway, in con-

formity with the terms of said Washer's bid so accepted by the county judge, executed the contract sued on and Washer entered upon the work; that thereafter, on November 17, 1878, the Bullitt county court, composed of the judge of the county court and a majority of the justices, with full knowledge that the work and services set forth in petition had been done under said contract, recognized and ratified said contract by the following order:

"It is ordered that Jacob Dauenhauer and Peter Baecker, assignees of W. T. Washer, contractor to build a bridge across Pond creek, be allowed the sum of twelve hundred dollars ($1,200.00), to be paid out of the 5 per cent. levy this day made."

It is not denied that this order was made, nor that the bridge was necessary for the use of the people and travel of Bullitt county. The defendant, with its answer, filed a transcript of the orders of the Bullitt county court in reference to this bridge and made defense—

1. Denial of the making of the contract, of the work, the authority of Ridgway as commissioner, and that it notified or compelled Washer to stop work; that it had right of way over the approaches; that Ridgway, as commissioner, executed the contract; that the defendant ratified or recognized the contract by orders mentioned in the amended petition; and alleged, 2, that the $600 paid Washer by the sheriff was paid without authority, and that the $1,200 was paid under an agreement that it should be in full of the work on the bridge, and was so appropriated by the majority of the county court on the representation of plaintiffs that they had done $3,000 worth of work on the bridge, and that it was good work, and that they would finish the bridge for the $1,800, and that the work was bad work and of no value; all of which was traversed, and the county made a counter-claim against Washer for the $600, and Dauenhauer and Baecker for the $1,200.

The county court record shows that on May 21st, 1877,

the county judge appointed Ridgway as commissioner to view Pond creek for a bridge and confer with the Jefferson county commissioner and report, and ordered the attendance of the justices at the next term in reference to the building of the bridge; that on June 18, 1877, the full court of justices met and Commissioner Ridgway filed his report, which was confirmed, as to the necessity of erecting a bridge upon the Brauner foundation site, and the full court appointed Ridgway to confer with the Jefferson county commissioners upon plans, specifications, and probable cost, and report at the next term of court. Ridgway's report, which the full county court approved, stated that he had met to confer with the Jefferson county commissioners, and they declined to take any action until after the Bullitt county court; he reported in favor of the Brauner foundation site; that a new bridge was necessary, the old bridge being very unsafe. July 16, 1877, the full court ordered that $600 be appropriated out of the county levy for the purpose of erecting said bridge across Pond creek at the Brauner foundation site, and J. W. Ridgway, commissioner, was directed "to report plans and specifications for erecting said bridge, and any bids that may be offered and the amount of cost of building said bridge herein. W. Carpenter, county judge, is authorized to receive bids and accept or reject the same, as he may think proper, looking to the interest of Bullitt and Jefferson counties in this matter. This day A. P. Steele relinquished in open court the right of way over his land for the public road running to the bridge proposed to be built across Pond creek at the Brauner foundation site." (Pr. Rec., pp. 20–23.) This order shows that the approaches to the bridge were relinquished as alleged by plaintiff. On November 19, 1877, an order was entered by the county judge that "James W. Ridgway be appointed commissioner in behalf of Bullitt county to contract for the building of the bridge across said creek at the place selected as a site, and report to the court on the matter." Later,

on the same day, by an order in the same county court record, the full county court appropriated $600 to the building of the bridge. (Pr. Rec., 23.) January 21, 1878, the county surveyor was ordered to meet with the commissioners to survey the site for the erection of the bridge across Pond creek at the Brauner foundation site and report to the court. February 18, 1878, Ramsey and Horine were appointed, in addition to Ridgway, to meet and confer with the Jefferson county commissioners. May 20, 1878, the commissioners filed their report, which showed the selection of the Brauner foundation site for the bridge. The report stated that the commissioners appointed by Jefferson county failed to meet them and report in favor of the Brauner foundation site. (Pr. Rec., 24.) The contract was made July 8, 1878. Then, on November 18, 1878, the full county court levied a tax "for the purpose of paying for the erection of the bridge across Pond creek," and ordered "that Jacob Dauenhauer and Peter Baecker, assignees of W. T. Washer, contractor to build a bridge across Pond creek, be allowed the sum of $1,200, to be paid out of the 5 per cent. levy made this day." The bill of exception shows that the plaintiff read in evidence from the transcript of the proceedings of the Bullitt county court, filed with defendants' answer to said orders, and offered evidence tending to show that in obedience to the said order of July 16, 1877, the commissioner, Ridgway, reported to Carpenter, county judge named in that order, plans, specifications, &c., for the bridge, and the amount of each of the bids, including Washer's bid, and that said Carpenter, county judge, received the plans and bids and accepted said bid of Washer, and that Ridgeway, commissioner, by the direction of Carpenter, county judge, executed and delivered to Washer the contract sued on, in conformity to said bid, and that plaintiff signed and delivered to Ridgway, commissioner, the copy which Ridgway kept; that said Carpenter, county judge, knew and approved of the contract; that plaintiff then read in evidence the contract, also the

assignment of the contract to Dauenhauer and Baecker, and offered evidence tending to show that Carpenter, county judge, sent the letter of December 10, 1878, to Ridgway, commissioner, and that Ridgway exhibited it to plaintiffs, and that in pursuance of its directions Ridgway ordered the contractor to quit work, and, in obedience to the notice, Exhibit "C," and Ridgway's order, they quit work. The notice, Exhibit C, dated December 10, 1878 (Pr. Rec., 6, 7), notified the contractor that Bullitt county would not be responsible or pay for any work he might do on the bridge, after service of the notice, and notified him to stop work—all work—on the bridge immediately or proceedings would be instituted to stop it. It was signed by Carpenter officially, as presiding judge of the Bullitt county court, and F. P. Straus officially, as county attorney. The letter of the same date to Ridgway stated that, after consulting Judge Muir and others, the work on the bridge must be stopped, so that Bullitt county could take steps to have Jefferson county do its part, and directed the commissioner to say to Washer to stop work until further notice.

Plaintiffs alleged, and it was not denied, that the bridge was necessary, and the order in the transcript filed by defendant shows that the county court adjudged this necessary; that the full county court in June, 1877, recognized Ridgway as commissioner, confirmed his report as to the necessity of erecting the bridge at this place, appointed him commissioner to confer with the Jefferson county commissioners, and in July, 1877, appropriated $600 for the purpose of erecting the bridge across Pond creek, and ordered Commissioner Ridgway to report plans, specifications, and bids, and authorized Carpenter, county judge, to receive bids and accept them or reject the same, as he might think proper. The testimony tended to show that after Ridgway was appointed to report plans, specifications, and bids and Carpenter was authorized to receive and accept or reject the same Ridgway did report plans, specifications, and bids,

and Carpenter did receive the bids, and Washer's bid was accepted under the order of the county and levy court. It appears that in November the full county court levied a tax for the purpose of paying for the erection of this bridge, and allowed Dauenhauer and Baecker, as assignees of Washer, contractor, $1,200 for this bridge. It is not pretended that this was for any other bridge or any other contract or contractor. The county court had, by its orders, placed the business in the control of Ridgway and Carpenter, and they had acted in pursuance of their authority. It is plain that this appropriation was a payment on account, and that after their agents had exercised the authority and got the work started and the county court had made a payment on account it was too late to claim that their agent was not authorized to contract to build the bridge. It was settled in the case of Washer *vs.* Bullitt County (110 U. S., 558) that if the county court made the orders mentioned in the pleading, authorized Ridgway to report plans and specifications, and Carpenter, county judge, to receive and accept the bids, and the county judge accepted the bid of Washer, and Ridgway made the contract under the order set forth in the petition, and that the making of the contract was ratified by the orders, as alleged, and if the statute was pursued as far as possible, which is shown in this case, Bullitt county had power to do what it did, and that the pleading showed a cause of action.

Plaintiff in error does not present any new argument on this power, but attempts to reargue this question, which has been settled. The fact that the contract contains a provision that the county of Jefferson was to pay her proportionate part is immaterial, for it was not signed for Jefferson, and the express promise of Bullitt county to pay the cost had never been performed. It is plain this provision was put in to lay the foundation for a claim on Jefferson county, and that subsequently "Judge Muir" advised them that they could not do it this way, and that then Bullitt county required the

plaintiff to stop work for the purpose of compelling Jefferson county to bear its proportion.

There is nothing in the claim that the second amended petition changed the cause of action. The contention that the contractors had no right to quit work under the notice to quit does not seem well founded. The county court appointed Ridgway, as commissioner, to report plans and bids to Carpenter, and appointed Carpenter to accept or reject them, and Ridgway did report and Carpenter did accept them. That of itself constituted a contract, and that is the contract which was reduced to writing, carrying out accurately the authority expressly intended by the county court.

Carpenter being authorized to accept bids reported by Ridgway, and being the agent of the county court in this matter, the plaintiffs were excusable in stopping the work when he ordered them to.

The ratification relied upon was that after its authorized commissioner had reported plans and the bid of Washer, and the authorized agent, the county judge, had accepted it, constituting the contract sued on, the county appropriated money to these contractors on that contract for that bridge. (Pr. Rec., pp. 25–'6, orders of November 18, 1878.) This was not a "year before the date of the contract." The contract was July 8, 1878, and this order was November 18, 1878. The only requirement was that the plans and bids reported by Ridgway and accepted by Carpenter were within the scope of the order which directed Ridgway to report them and authorized Carpenter to accept them. The report of Ridgway and the acceptance by Carpenter were within the express terms of the authority, and they constituted a contract for Bullitt county, and we do not care to go into an elaborate review of the ingenious line of argument of plaintiffs on this subject.

Carpenter's letter to Ridgway and Washer and Ridgway's order to Washer to stop were not read in evidence to show ratification. They were read to show the contractor's right

to quit work and sue before the work was completed, and they were competent for that. There is nothing in the pleadings or proof to show that Bullitt county was "small" or "thinly settled as compared with Jefferson county," or that there was "a difference of five to one" between the counties. There is no proof that by any fraud of plaintiffs the tax-payers of Bullitt county lost money and failed to get a bridge.

It is urged that a county can contract only through and by the county court, and that the county court can act only by its record. This case satisfies that condition, for the full county court did, by its record, order the bridge, order Ridgway to report plans and bids for it, and authorize Carpenter to accept the bid. It cannot be pretended that the contract itself must be spread of record, and that the record must show how many rocks or what kind of mortar must be used, &c. None of these things can be told beforehand. It is possible that the county court could not tell beforehand all that would be necessary. Plaintiffs in error in their brief, at page 14, do not, it seems to us, understand clearly the facts as developed in the record. They quote the order which directed Ridgway to report plans and bids and the amount of each bid and authorized the county judge to receive and accept or reject bids. That order contemplated Ridgway's reporting plans and specifications for erecting the bridge and bids and the amount of bids on such plans; in other words, gave Ridgway authority to determine the dimensions and all specifications for the bridge and to report bids, and the county judge was authorized to receive and accept or reject the bids. He had no authority as to plans or specifications. Ridgway had no authority as to accepting or rejecting bids. The two together had full authority for Ridgway to determine plans and report bids and Carpenter to accept. Washer made his bid to Ridgway on the plans and specifications determined by Ridgway. Ridgway reported those plans, specifications, and bids to Carpenter and Carpenter accepted

Washer's bid to build the bridge on the plans and specifications at prices named in the bid, and then the contract was complete. The authority was of record, and the "report" by Ridgway, commissioner, and the bid "accepted by Carpenter, county judge," constituted an authorized contract. Further memorandum was not necessary, but one was made out evidencing the plans and specifications and prices so agreed upon, and one copy was kept by said commissioner and the other by the contractor. Carpenter made the contract. It was complete before the writing filed with the petition was made; but, if all these things were informal, in November the county court levied a tax and ordered $1,200 to be paid to the assignee of Washer, "contractor," to build the bridge across Pond creek.

Plaintiff in error admits that "the fact presses itself that the order of court imports upon its face some knowledge of an existing contract," and that they "are unable to contend that it did not amount to a ratification to the extent of such knowledge," but they contend that the record showed a purpose for Bullitt county to act only in conjunction with Jefferson county and for each county to pay its part, when, in fact, the record showed Ridgway's report (Pr. Rec., page 21) that Jefferson county declined to take any action "until after the action of the Bullitt county court." This was June 18, and on July 16 the county court, in the face of the fact that Jefferson county declined to take any action until after action of Bullitt county—in other words, knowing that the Jefferson county commissioners expressly refused—the fall county court appropriated $600 to build *the bridge* and appointed Ridgway commissioner to report plans and specifications for the erection and authorized Carpenter to receive bids and accept them. It put in the clause "looking to the interest of Bullitt and Jefferson counties," to use afterwards, to get Jefferson county to pay its part; but it is plain that this action was not taken in the belief that Ridgway was to act with Jefferson county commissioners, but on the knowledge,

of record, that Jefferson county commissioners would not act with Ridgway; and the appropriation in the following November was not made on any record that Jefferson county was a party, but, on the contrary, from Ridgway's report of June 18, 1877, that the commissioners of Jefferson county declined to take any action, and the report of May 20, 1878 (Pr. Rec., 24), that the commissioners appointed by the Jefferson county court to meet the Bullitt county commissioners had failed to do so, and that the Bullitt county commissioners had proceeded alone, until the order of November 18, 1878, there was no order nor proceeding from which the Bullitt county court could suppose that it was making this appropriation for the Bullitt county's part and not for the whole bridge; but, on the contrary, on the 25th day of October, 1878, the Bullitt county court had ordered the Bullitt county attorney to institute suit to compel Jefferson county to levy its proportion of the cost. (Pr. Rec., 25.) In other words, the Bullitt county and levy court, on November 18, 1878, in the face of the report of June, 1877, that Jefferson county declined to take any action in the matter, and the report of May 20, 1878, that Jefferson county commissioners failed to meet the Bullitt county commissioners, in the face of the county court's order (October 25) directing the Bullitt county attorney to take steps to compel Jefferson county to pay its part, after the order directing Ridgway to report plans and bids and authorizing Carpenter to accept them, and after Ridgway had reported plans and bids and Carpenter had accepted the bids and thousands of dollars' worth of work had been done the full county court levied a tax and allowed the assignee of Washer, contractor, $1,200. It is hardly "distorting" to construe this as a ratification of the only contract that existed, but it seems to us that it is distortion to claim that, on such a record, the Bullitt county court only contemplated paying a part of the costs of the bridge.

Nor is this a suit on a guarantee. By contract Bullitt county agreed to pay so much a yard and so much a foot for

the whole bridge. Carpenter was authorized to accept plans for the whole bridge, and so it was done.

As to Washer, it is plain that the court has no jurisdiction; that the total amount involved in any state of the case is the amount in the judgment, $4,180.07, and the counterclaim, $600.00, against Washer; in all, less than $4,800.00.

The premises considered, we submit, respectfully, that there was no error in the proceedings in the court below, and ask that the judgment of the circuit court be affirmed.

Respectfully submitted.

AUGUSTUS E. WILLSON,
Of Counsel for Defendants in Error.